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IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

National Fair Housing Alliance, Inc., et al.,)	CASE NO. C07-03255-SBA
)	
Plaintiffs,)	MEMORANDUM OF POINTS AND
)	AUTHORITIES IN SUPPORT OF
vs.)	DEFENDANTS' MOTION TO
)	STRIKE VARIOUS CLAIMS FOR
A.G. Spanos Construction, Inc., et al.)	RELIEF SOUGHT IN PLAINTIFFS'
)	COMPLAINT
Defendants.)	
)	[Fed. R. Civ. P. 12(f)]

Hearing Date: October 2, 2007
 Time: 1:00 p.m.
 Dept.: Courtroom 3

Complaint Filed: June 20, 2007

Defendants A.G. Spanos Construction, Inc., A.G. Spanos Development, Inc., A.G.
 Spanos Land Company, Inc., and A.G. Spanos Management, Inc. (collectively, "Defendants")
 respectfully submit this Memorandum of Points and Authorities in support of their motion to
 Strike various claims for relief sought in the Complaint of Plaintiffs National Fair Housing
 Alliance, Inc., Fair Housing of Marin, Inc., Fair Housing Napa Valley, Inc., Metro Fair
 Housing Services, Inc., and Fair Housing Continuum, Inc. (collectively, "Plaintiffs").

INTRODUCTION AND SUMMARY OF ARGUMENT

“A motion to strike is appropriate to address requested relief, such as punitive damages, which is not recoverable as a matter of law. . . .” (*Wilkerson v. Butler*, 229 F.R.D. 166, 172 (E.D. Cal. 2005).)

Much of the relief requested in Plaintiffs’ complaint is not recoverable as a matter of law. Specifically, Plaintiffs’ request that this court award to Defendants - - “such damages as would fully compensate Plaintiffs for their [plaintiffs’] injuries incurred as a result of Defendants’ discriminatory housing practices and conduct” - - is not recoverable as a matter of law. Damages are not recoverable under the ADA. Further, Plaintiffs’ alleged “damages” are not compensable under the FHAA because Plaintiffs are not members of the class of persons protected under the FHAA.

Similarly, Plaintiffs’ request for “punitive damages against Defendants” - - is not recoverable as a matter of law because Plaintiffs do not allege that anyone has been injured by an invasion of anyone’s federally protected rights.

Finally, Plaintiffs’ request for an injunction “[r]equiring Defendants to . . . bring each and every apartment community [sued upon] into compliance with the requirements of [the FHAA]. . . and into immediate compliance with the requirements of [the ADA]” - - cannot be granted, as a matter of law, because Defendants are not the current owners of the properties sued upon. Only current owners are liable for injunctive relief under the ADA and FHAA.

ARGUMENT

I. PLAINTIFFS’ REQUEST FOR DAMAGES SHOULD BE STRICKEN BECAUSE DAMAGES ARE NOT RECOVERABLE AS A MATTER OF LAW.

In their prayer, Plaintiffs request a judgment in their favor:

“Awarding such damages as would fully compensate Plaintiffs for their injuries incurred as a result of Defendants’ discriminatory housing practices and conduct.”
(Complaint, p. 39:12-14)

Damages are not recoverable under the ADA. “The enforcement provisions of Title III [of the ADA] provide only for injunctive relief. Damages are not available. . . .” (*Pickern v.*

1 *Holiday Quality Foods, Inc.* 293 F.3d 1133, 1136 (9th Cir. 2002).)

2 Nor are damages recoverable by these plaintiffs under the FHAA. To state a claim
3 under the FHAA, plaintiffs must be members of the class of persons protected under the
4 FHAA, or they must sue on behalf of members of the protected class. As explained in
5 *Wasserman v. Three Seasons Assoc. No. 1, Inc.*, 998 F. Supp. 1445 (S.D. Fla. 1998):

6 **Plaintiffs do not dispute that they are not members of a class protected**
7 **under the FHA. Rather, they contend that they are entitled to standing as**
8 **“aggrieved persons” under the FHA.**

9 * * * *

10 The Supreme Court jurisprudence applying the “aggrieved persons” provision
11 of the FHA makes clear that an “aggrieved person” is not just any non-class
12 member who protests what he perceives to be a discriminatory housing policy.
Rather, an “aggrieved person” is a non-class member who (1) suffers actual
injury **as an ancillary effect** of present or imminent discrimination against a
protected class member and (2) challenges the discriminatory policy **on behalf**
of that class member.

13 *Id.*, 998 F.Supp. at 1446-1448, emphasis added.

14 To state a claim in themselves or on behalf of others under the FHAA, plaintiffs must
15 plead that plaintiffs belong to or sue on behalf of a “class of persons” protected by the FHAA
16 and that a person who is a member of the protected class would have rented defendants’
17 housing but for defendants’ discriminatory housing practices. *Michigan Protection and*
18 *Advocacy Services, Inc. v. Basin*, 799 F.Supp. 695, 706 (Mich. 1992); *Oakridge Care Center,*
19 *Inc. v. Racine County*, 896 F.Supp. 867, 873-874 (E.D. Wisc. 1995). The class protected
20 under the FHAA consists of persons denied a rental because they are disabled or because they
21 associate with disabled persons. *Oakridge Care Center, Inc., supra*, 896 F.Supp. at 873-874.

22 In the instant case, Plaintiffs do not claim to be disabled renters (members of the
23 protected class). Plaintiffs do not sue on behalf of disabled renters (also members of the
24 protected class). Since Plaintiffs do not sue by or on behalf of members of an FHAA protected
25 class - they state no claim for relief in themselves (or otherwise) under the FHAA and are
26 therefore not entitled to “damages . . . [to] compensate Plaintiffs” - - as prayed for in their
27 Complaint.
28

1 **II. PLAINTIFFS' REQUEST FOR PUNITIVE DAMAGES SHOULD BE STRICKEN**
 2 **BECAUSE PUNITIVE DAMAGES ARE NOT RECOVERABLE AS A MATTER**
 3 **OF LAW UNDER THE ADA, NOR MAY PUNITIVE DAMAGES BE**
 4 **RECOVERED UNDER THE FHAA IN THIS CASE.**

5 In their prayer, Plaintiffs request a judgment in their favor: "Awarding such punitive
 6 damages against Defendants as are proper under law." (Complaint, p. 39:14-15)

7 Under the ADA, Plaintiffs may only seek injunctive relief. (*Pickern v. Holiday Quality*
 8 *Foods, Inc.* 293 F.3d 1133, 1136 (9th Cir. 2002).)

9 Under 42 U.S.C. section 3613(c)(1) of the FHAA, a plaintiff may recover "actual . . .
 10 damages" and may also recover "punitive damages." (*Ibid.*) Punitive damages are
 11 recoverable under the FHAA, where plaintiffs allege and prove that defendants' "malice" or
 12 "reckless indifference" actually harmed a disabled person's federally protected rights. (*Kilroy*
 13 *v. Husson College*, 959 F.Supp.22, 24 (D. Maine 1997.) But Plaintiffs herein do not claim to
 14 be disabled persons harmed by invasion of their federally protected rights. Nor do Plaintiffs
 15 sue on behalf of third-party disabled persons who claim to have been harmed by invasion of
 16 their third-party federally protected rights.

17 For these reasons, Plaintiffs' Complaint cannot support a claim for punitive damages.

18 **III. PLAINTIFFS' REQUESTED INJUNCTIVE RELIEF REGARDING ALL**
 19 **APARTMENTS PREVIOUSLY BUILT IS NOT RECOVERABLE AS A MATTER**
 20 **OF LAW.**

21 In their prayer, Plaintiffs request judgment granting an injunction requiring Defendants
 22 to: "bring each and every [existing] apartment community [previously built by defendants] into
 23 compliance with the requirements of 42 U.S.C. § 3604(f)(3)(C), and the applicable regulations
 24 and into immediate compliance with the requirements of 42 U.S.C. §§ 12182-83 and the
 25 applicable regulations." (Complaint, p. 39:7-12)

26 **A. Plaintiffs Have Failed to State a Claim for Injunctive Relief under the ADA**
 27 **Against These Defendants Because Plaintiffs Fail to Allege That These**
 28 **Defendants Are the Current Owners of the Subject Apartments.**

Under Title III of the ADA, liability is limited to persons who own, lease or operate a
 "place of public accommodation." 42 U.S.C. § 12182(a); *Lonberg v. Sanborn Theaters, Inc.*,
 259 F.3d 1029, 2001 U.S.App.LEXIS 17418 (9th Cir. 2001). Plaintiffs fail to state a claim for

1 relief because Plaintiffs do not allege that defendants are the current owners of the Subject
 2 Properties. To the contrary, three of the four defendants do not own any of the 85 identified
 3 properties. Defendant A.G. Spanos Construction, Inc. owns only one of the identified
 4 properties, an Untested Property located in Kansas. (RJN, Ex. 48.)

5 The Ninth Circuit explained this limitation on potentially liable parties:

6 With the exception of suits brought by the Attorney General, actions under Title
 7 III are limited only to injunctive relief. 42 U.S.C. § 12188(a). This is
 8 significant because, after the noncompliant building has already been built,
 9 injunctive relief is only meaningful against the person currently in control of the
 10 building. That is, the architect who built the building is by the time of suit by
 11 an eligible plaintiff out of the picture. This limitation on relief suggests that
 12 reading Title III to make architects, and others who do not own, lease, or
 13 operate buildings, such as builders and construction subcontractors, liable for
 14 “design and construct” discrimination would create liability in persons against
 15 whom there is no meaningful remedy provided by the statute.

16 *Lonberg v. Sanborn Theatres, supra*, 259 F.3d 1029, 2001 U.S.App.LEXIS 17418, at *18.

17 **B. Plaintiffs Have Failed To State a Claim For Injunctive Relief Under the**
 18 **FHAA Because Plaintiffs Fail to Allege That These Defendants Are the**
 19 **Owners of the Subject Properties; Only Current Owners Are Liable Under**
 20 **the FHAA.**

21 42 U.S.C. sections 3604(f)(1) and (f)(2) make it “unlawful” to deny a rental to disabled
 22 persons, or to deny a rental to those associated with disabled persons. It is landlords - not
 23 builders - who are in a position to deny rentals:

24 The “failure to design and construct” language of 3604(f)(3)(C) might be
 25 thought to limit the targets of this provision to those who ‘design’ or ‘construct’
 26 covered multi-family dwellings, but this interpretation seems wrong. As one
 27 court has observed, 3604(f)(3)(C) “is not a description of who is liable. Rather,
 28 it is a description of what actions constitute discrimination.”

29 R. Schwemm, “Barriers to Accessible Housing: Enforcement Issues in Design and
 30 Construction Cases under the Fair Housing Act, 40 U. Richmond L.Rev. 753, 776 (and
 31 authorities cited therein).

32 “The conduct and decision-making that Congress sought to affect [by passage of the
 33 FHAA] was that of persons in a position to frustrate . . . the housing choices of handicapped
 34 individuals who seek to buy or lease housing . . . [P]rimarily . . . those who own the property
 35 of choice and their representatives.” *Growth Horizons, Inc. v. Delaware County*, 983 F.2d
 36 1277, 1283 (3d Cir. 1993). “[A]fter a noncompliant building has already been built . . .

injunctive relief is only meaningful against the person currently in control of the building.”
Lonberg v. Sanborn Theatres, supra, 259 F.3d 1029, 2001 U.S. App. LEXIS 17418, at * 18.
 “[The] presence [of the current owner] as a party in [an FHAA] suit appears imperative in
 order to afford full relief.” *Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.*, 40
 F.Supp.2d 700, 712 (D.C. Md. 1999).¹

Because Plaintiffs have not sued the “current owners” of the Subject Properties,
 Plaintiffs’ request for injunctive relief “is not recoverable as a matter of law.”

CONCLUSION

For the foregoing reasons, Defendants’ Motion to strike various claims for relief sought
 in Plaintiffs’ Complaint should be granted in its entirety.

Dated: August 15, 2007

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By


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¹ Professor Schwemm explains: “Well established tort principles, which were in place
 at the time of the 1988 FHAA’s enactment and which continue in force today, provide for
 liability for residential landlords based on their property’s defects, even if such a landlord had
 no role in causing those defects and so long as he has had sufficient time to discover and
 correct the defects.” (40 U. Richmond L.Rev. at 797-798.) Commercial landlords are also in
 a position to place “indemnity” agreement provisions into their contract to purchase an
 apartment building from a prior owner or prior developer.